BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SANDRA STAGGS (formerly HAMM)	)	
Claimant	)	
VS.	)	
	)	Docket No. 210,500
HUNTER CARE CENTERS, INC.	)	
Respondent	)	
AND	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the June 30, 1998 Award and the July 13, 1998 Nunc Pro Tunc of an Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument on February 24, 1999.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for the claimant. James M. McVay of Great Bend, Kansas, appeared for the respondent and insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award and the Nunc Pro Tunc of an Award. In addition, respondent announced at oral argument that whether claimant's injuries arose out of and in the course of employment was no longer at issue. Thus, the Appeals Board will consider it stipulated that claimant met with personal injury by accident on the date alleged and that her injury arose out of and in the course of her employment with respondent.

ISSUES

This is a claim for a January 18, 1996 accident. The Judge found that claimant had a 51 percent work disability. Also, the Judge found that medical records submitted by

stipulations that reserved claimant's objection pursuant to K.S.A. 44-519, should not be considered.

Respondent requested the Appeals Board to review the nature and extent of claimant's injury and disability as it contends that claimant has not made a good faith attempt to find appropriate employment post accident and, therefore, a wage should be imputed. Respondent further contends that because claimant is capable of earning wages comparable to the average weekly wage claimant was earning at the time of her accident there can be no award for a work disability. Also, respondent contends that the Judge erred by excluding the hospital records offered by stipulation.

Claimant, on the other hand, contends the Judge should have awarded a 60.5 percent work disability and also erred in her calculation of claimant's average weekly wage.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) On January 18, 1996, Sandra Staggs injured her back while attempting to lift a patient. At the time, Ms. Staggs was working as an aide at the Kingman Manor nursing home and was in training to become a CNA.

(2) The parties have stipulated that the accident arose out of and in the course of claimant's employment with respondent.

(3) Ms. Staggs was authorized to obtain medical treatment initially from Dr. Victoria M. Moots. She has been treated and/or examined by numerous physicians including Dr. C. Reiff Brown, Dr. Merwin B. Moore, III, Dr. Pedro A. Murati, Dr. Iris A. Brossard and Dr. C. William Alexander, all of whom testified in this case, as well as Doctors Philip R. Mills, L. B. Nolla, Teresa A. Reynolds, James Hay, Connie M. Marsh, L. Theil Bloom, Blake C. Veenis, R. Stephen Smith, Lester Donley, Steven E. Albert, Alan Brewer, R. E. Bellar, R. Crenshaw, L. R. Will, L. S. Allison, William M. Shapiro, O. Sollo, Abay, and J. M. Sack who either were mentioned in testimony or their records were placed into evidence.

(4) The Appeals Board finds that Ms. Staggs permanently injured her back in the January 18, 1996 accident. That conclusion is supported by the testimonies of both Dr. Moots and Pedro A. Murati, M.D. Although the other doctors who testified, including orthopedic surgeon C. Reiff Brown, M.D., did not provide an opinion that Ms. Staggs did not injure her back in the January 1996 accident, they did call into question the severity and the permanency of that injury. There is also evidence to suggest claimant sustained subsequent intervening injuries to her back unrelated to her work for respondent.

(5) Claimant was last seen by Dr. Moots on January 24, 1997. Dr. Moots and Dr. Moore did not issue restrictions for claimant. Dr. Brown gave claimant restrictions of

50 pounds occasional lifting, 30 pounds frequent lifting and all lifting to be done using proper body mechanics. Dr. Murati gave temporary restrictions of no squatting; occasional walk, bend, and crawl; frequent sit and stand; frequent driving; no more than 35 pounds lift occasionally; and push-pull 20 pounds frequently, 10 pounds constantly. He testified that in the absence of the treatment he recommended, these restrictions would become permanent.

(6) Dr. Murati rated claimant's impairment at 20 percent to the body as a whole. Dr. Brown gave an impairment rating of 5 percent whole body. Dr. Moots did not give an impairment rating but did testify that Dr. Murati's rating was reasonable.

(7) Since her accident and release to work, Ms. Staggs has worked some part-time jobs but has never worked a full-time job nor looked for full-time employment with any employer. Her hourly rate in some of those part-time positions she has held since her accident exceed the $5.50 per hour she was earning while employed by respondent.

(8) The Appeals Board finds that Ms. Staggs retains the ability to work 40 hours a week and earn at least minimum wage or $206 per week.

CONCLUSIONS OF LAW

(1) By stipulations dated March 19, 1998 and March 31, 1998, the parties introduced hospital records from Harper Hospital District No. 5, Kingman Community Hospital, St. Joseph Regional Medical Center of Northern Oklahoma, Inc., Wesley Rehabilitation Hospital and Via Christi Regional Medical Center subject to claimant's objection based upon K.S.A. 44-519. Claimant does not point to any specific opinion or opinions in these records that she finds objectionable. Instead, claimant simply makes a blanket objection to all of the records based upon K.S.A. 44-519. That objection is overruled. First, K.S.A. 44-519 does not operate to exclude all medical records. Rather it excludes only opinions that are not supported by the physician's testimony. Second, even those opinions which are otherwise inadmissible may be considered by other medical experts in formulating their opinions.[1] Many of these records had been provided to the physicians that testified, including Dr. Murati and Dr. Brown. Furthermore, the Appeals Board finds these hospital treatment records do not contain the type of examination reports contemplated by K.S.A. 44-519. The records do not contain opinions that were generated for purposes of litigation, such as under K.S.A. 44-515, and do not contain rating reports that go to the question of impairment as opposed to treatment. For these reasons the records covered by the stipulations have been considered by the Appeals Board.

(2) Claimant worked for respondent part time at an hourly rate of $5.50. Following K.S.A. 44-511(b)(5) the Judge determined claimant's average weekly wage to be $146.14.

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[1] Roberts v. J.C. Penney Co., 263 Kan. 270, 949 P.2d 613 (1997).

Claimant agrees with the Judge's calculation if she is found to have been a part-time worker. But claimant contends she was hired to work 35 hours per week and therefore her average weekly wage should be based upon 35 hours a week at $5.50 per hour or $192.50. She admits, however, that this 35 hour work schedule was contingent upon her successfully completing her training and becoming a CNA. Claimant never achieved that status and was never considered full time. The record establishes that claimant was to be part time while in training. Therefore, K.S.A. 44-511(b)(4)(A) and K.S.A. 44-511(b)(5) apply and the Judge's finding that claimant's average weekly wage was $146.14 is affirmed.

(3) Because hers is an "unscheduled" injury, Ms. Staggs's permanent partial general disability is determined by K.S.A. 44-510e which provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute, however, must be read in light of Foulk[2] and Copeland.[3] In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

(4) As indicated above, despite an ability to do so, Ms. Staggs has neither worked full-time nor looked for full-time employment since her accident. This does not constitute a good faith effort to find appropriate employment, pursuant to Copeland. The Appeals Board concludes that a post-injury wage based upon a 40-hour work week should be imputed. Comparing the $206 per week that Ms. Staggs retains the ability to earn and the

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[2] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[3] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

$146.14 per week that Ms. Staggs was earning before the January 1996 accident yields no loss. Even comparing hourly rates, claimant has demonstrated an ability post-injury to earn as much or more than she was earning per hour at the time of her injury. Because she retains the ability to earn more than 90 percent of the average gross weekly wage that she was earning at the time of the injury, there can be no award in excess of her percentage of functional impairment.[4]

(5) The Judge did not make a finding concerning claimant's percentage of functional impairment and there was no stipulation to this by the parties. Claimant argues for Dr. Murati's 20 percent rating, whereas respondent contends claimant's functional impairment is at most the 5 percent as opined by Dr. Brown. Although respondent argues that Dr. Brown had a more complete history than did Dr. Murati, the Appeals Board considers the foundation for Dr. Murati's opinion to have been adequate. Giving some weight to the opinions of both Dr. Murati and Dr. Brown, as well as to the opinions of Dr. Moots, the Appeals Board finds claimant's percentage of functional impairment and her permanent partial disability to be 10 percent.

(6) The parties placed a large number of hospital records into this record. For future reference, counsel should try to limit their exhibits to only those portions of the records that are material to the issues.

AWARD

WHEREFORE, the Appeals Board modifies the Award to set aside the work disability award and to instead award permanent partial general disability benefits based upon the percentage of functional impairment.

Sandra Staggs is granted compensation from Hunter Care Centers, Inc. for a January 18, 1996, accident. Ms. Staggs is entitled to receive 26 weeks of temporary total disability compensation based upon a $146.14 average weekly wage for a total of $2,533.18, followed by 40.4 weeks at $97.43 per week, or $3,936.17, for a 10% permanent partial general disability, making a total award of $6,469.35, which is ordered paid in one lump sum less amounts previously paid.

The Appeals Board adopts all remaining orders of the Judge not inconsistent with the above.

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[4] K.S.A. 44-510e(a).

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

The undersigned Board Members while not objecting to the majority finding of permanent partial disability do object to allowing certain medical records into evidence over claimant's objection.

K.S.A. 44-519 limits the admissibility of certain medical records.

> No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

The majority in its conclusions found that these hospital treatment records are not subject to K.S.A. 44-519. The majority held:

> these hospital treatment records do not contain the type of examination reports contemplated by K.S.A. 44-519. The records do not contain opinions that were generated for purposes of litigation, such as under K.S.A. 44-515, and do not contain rating reports that go to the question of impairment as opposed to treatment. For these reasons the records covered by the stipulations have been considered by the Appeals Board.

K.S.A. 44-519 makes no distinction regarding records and reports generated for the purpose of litigation or that go to the question of impairment as opposed to treatment. It

is acknowledged that under certain statutes such as K.S.A. 44-510e and K.S.A. 44-516 medical records may at times be allowed into evidence absent the testimony of the health care provider author. However, those statutes are not in question here. What is in question is the effect of K.S.A. 44-519 on medical records where the testimony of the health care provider supporting those records is not provided. In effect, the majority opinion allows into the evidentiary record a plethora of medical records without affording the opposing parties an opportunity to question their relevance or test their reliability. In this instance the undersigned would find claimant's objection to the medical records was appropriate and timely made and any records not supported by the testimony of the authoring providers should be excluded from consideration.

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
James M. McVay, Great Bend, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director